No. 98-5881

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

BENJAMIN LEE LILLY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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COMMONWEALTH'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should certiorari be granted to review arguments which were not properly preserved because they were not presented to the Virginia Supreme Court until Lilly filed a petition for rehearing?

2. Should certiorari be granted to decide whether a hearsay exception is "firmly rooted" in the law even though a determination of the issue can have no effect on Lilly's case because Virginia law requires a "reliability" determination in every case involving hearsay?

3. Should certiorari be granted to review the Virginia Supreme Court's fact-bound determination that hearsay evidence was reliable and therefore admissible under Virginia's exception for declarations against penal interest?

4. Should certiorari be granted to decide whether a State may require independent corroborating evidence of the trustworthiness of a hearsay declarant's statement against penal interest?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authority

STATEMENT OF THE CASE

Benjamin Lilly was tried by a jury in the Circuit Court of Montgomery County, Virginia, and found guilty on October 25, 1996, of the capital murder of Alexander DeFilippis as well as of robbery, abduction, carjacking, possession of a firearm by a felon, and four charges of the illegal use of a firearm.

In a separate sentencing proceeding on October 28, 1996, the jury sentenced Lilly to death for the capital murder on the basis of both of Virginia's aggravating factors: "future dangerousness" and "vileness." See Va. Code § 19.2-264.4. The jury also sentenced him to life imprisonment for robbery, life imprisonment for carjacking, ten years for abduction, five years for possession of a firearm by a felon, and four terms of three years each for the four convictions of the illegal use of a firearm. After considering a probation report and other evidence presented during the post-sentencing hearing held on February 11, 1997, the trial court imposed the sentences which had been fixed by the jury: one death penalty, two life sentences plus 27 years in prison.

On April 17, 1998, the Virginia Supreme Court unanimously affirmed the convictions and sentences. Lilly v. Commonwealth, 255 Va. 558, 499 S.E.2d 522 (1998). On June 5, 1998, the Virginia Supreme Court denied Lilly's petition for rehearing.

STATEMENT OF FACTS

Sometime on December 4, 1995, twenty-seven-year-old Benjamin Lilly got together with his twenty-year-old brother, Mark Lilly, and Mark's nineteen-year-old roommate, Gary Barker, at the defendant's home in Riner, Virginia, to drink and "smoke a little...pot." (JA 2030-2031).[1] Later that night, the three men decided to go to Floyd County to Danny Saunders' home. (JA 2031). The defendant drove them in his Mercury Cougar. (JA 2030). Mark and Gary knew Saunders, had been to his home before and knew that he kept liquor and guns there. (JA 2032).

[1] References to the Joint Appendix filed below are denoted as "JA ___." Copies of those parts referenced herein are included in the Respondent's Appendix A filed with this brief.

When they arrived at Saunders' home and found that Saunders was not there, they "decided just to go on in and help ourselves." They "[b]usted out the front glass in the door," went inside and took 9 bottles of liquor and 3 guns. (JA 2033). The guns were a .35-caliber rifle, a 16-gauge shotgun and a .38 caliber pistol. (JA 2032). Each gun was loaded. They also took a safe. (JA 2034).

They loaded everything into the defendant's car, went to the defendant's sister's home and "busted" open the safe. Inside they found old coins, a money clip, stamps and knives. They split up the loot, began drinking the liquor and then decided to drive to Warren Nolen's home in Radford to see if they could "trade the guns for some dope." Nolen was the defendant's friend. (JA 2035-2037). Around 7:30 p.m., they arrived at Nolen's home in Radford and displayed their loot to Nolen and his girlfriend, Patricia Quesenberry. (JA 1599-1601, 1586-1588). Patricia knew that Nolen could get into trouble if he was around guns because he was a convicted felon (JA 1589, 1601), so she and Nolen told the defendant and his companions to leave. (JA 1590). The three left after determining that they would be unable to sell or trade the loot because Nolen did not have "enough dope." (JA 2037).

The three men then drove to the trailer in Blacksburg where Mark and Gary rented rooms from "A.J." Fall, and spent the remainder of the night there. (JA 2038). The defendant, Mark and Gary left A.J.'s together on December 5, 1995, at about noon. (JA 2440). They drove the backroads around Shawsville and Elliston, drinking the stolen liquor. They stopped at a small country store, pumped gas for the car and left without paying. (JA 2040). They stopped in a wooded area of Shawsville where Gary fired the rifle and both Mark and the defendant took turns firing the pistol. (JA 2041). They then drove to Alleghany, stopped at a church and Gary and Mark shot at some geese with the rifle and shotgun. They killed one goose and placed it in the trunk of the car. (JA 2043).

They then drove back to the Blacksburg trailer park where they tried, unsuccessfully, to sell

or trade the guns for "dope." (JA 2044-2046). At about 6:00 p.m., the three drove to a bar in Blacksburg called "Cowboys." They entered the bar where Mark recognized Ron Lucas from his construction job. (JA 1613). Mark asked Ron to go outside, showed Ron the pistol and offered it for sale. Ron asked if it was "hot," meaning stolen, Mark told him it was, and Ron handed it back to Mark. (JA 1614-1615). The defendant and Gary then came outside, Ron went back in the bar and the defendant, Mark and Gary drove away. (JA 1615, 1619).

They drove along Prices Fork Road heading into Blacksburg with the intention of returning to the trailer park to find some "dope." (JA 2049). As they were driving, however, the car's engine quit at the top of a hill and they were forced to coast the car to a position on the wrong side of the road and across from a convenience store. (JA 2050-2051). They got out of the car, removed the license plates, liquor and guns, with the intention of "stashing" them in the woods until they could "steal" a car to "get out of there." (JA 2051). Gary had the rifle, Mark had the shotgun and the defendant had the pistol. (JA 2052).

In another part of Blacksburg – College Park – two Virginia Tech students were preparing for their upcoming final exams. Tom Staeger and Alexander DeFilippis had been roommates and friends for four years. Alexander was twenty-two years old and was majoring in environmental science. (JA 1503-1504). He planned to spend the holidays with his family in this country and in Italy. (JA 1504).

That evening – December 5, 1995 – Tom and Alex left their apartment in College Park in Alex's car at about 7:00 and drove to a friend's to borrow some class notes. (JA 1503-1504). Alex drove his Plymouth K-car. (JA 1508-1509). Alex wore glasses and a watch and carried a wallet with a few dollars in it. (JA 1503-1504). They had planned to copy the notes at a convenience store's copier machine and then go to the school's library to study. (JA 1503). Alex drove them to a convenience store called the "Hethwood Express." (JA 1505).

On their way to the store, Alex hit a curb with his right front tire. (JA 1509). When they

arrived at the store, Alex got out to look at his tire while Tom went inside to copy the notes. (JA 1510). That was the last time Tom saw Alex because, when he came out of the store, neither Alex nor his car were there. Tom called their apartment to see if Alex had returned, found out that he had not, and then noticed what looked like an abandoned car across the street. (JA 1506). Tom called "911" and the Blacksburg Police Department responded at about 7:20 p.m. (JA 1507).

When the defendant and his companions abandoned their car across from the convenience store, the defendant told the others to walk into the woods and "he would get us a car." (JA 2052). The defendant walked over to Alex, pointed the pistol at him and told him to give him his money. (JA 2054). Alex handed over his wallet. (JA 2055). The defendant called to Mark and Gary and they all got in Alex's car. (JA 2055-2056). The defendant got in the driver's seat, Gary got in the passenger's seat and Mark got in the back seat. The defendant ordered Alex to sit in the back with Mark. (JA 2054).

The defendant drove off towards Whitethorne, and during the ride Alex told his abductors that he would have given them a ride if they had asked, implored them to take him back to the store to pick up his friend and promised he would take them wherever they needed to go. (JA 2056). The defendant drove across a bridge and onto a deserted stretch of property owned by the Norfolk and Southern Railway Company. (JA 1721, 1764). The defendant stopped the car and Mark and Gary told Alex to close his eyes when they opened the car door to get out so that Alex could not see their faces. Mark had the pistol in his waistband at that time. (JA 2057).

After they all got out of the car, Mark told Alex to start walking and then the defendant ordered Alex to take his clothes off. (JA 2061). The night was cold and windy and it started snowing later. (JA 1734). Alex stripped down to his underwear briefs and socks. (JA 2061). Gary and Mark thought they were going to leave Alex there, forcing him to walk to a phone. (JA 2062-2063). Gary got back into the car in the driver's seat and Mark got in on the passenger's side. (JA 2063). The defendant got into the back seat and demanded that Mark give him the pistol. (JA

2064).

The defendant ran after Alex, who had walked about fifty yards, turned him around and shot him four times with the pistol. (JA 2063-2064). Three of the shots were to Alex's head: one bullet went straight through the right side of his upper lip; one bullet went into his neck under his left earlobe and out through the back of his neck; one bullet went into his head above the right ear, through his brain and lodged in the left temporal bone. A fourth bullet went straight through his right forearm. (JA 1973-1974). All four shots were fired from a distance of more than two feet. (JA 1974). Alex died shortly after he was shot in his brain. (JA 1976).

With the first shots, Alex threw his arm up in defense and tried to stagger away. (JA 2064). When the fatal shot was fired, Alex fell backwards onto some discarded steel containers. (JA 1722). Alex's eyeglasses were found later at a distance of close to fifty feet away from where he finally fell. (JA 1825). A zigzagging blood trail showed where Alex had staggered before he fell. (JA 1735).

After the shooting, the defendant got into the car and told Gary and Mark that "that boy saw his face" and "I've been in the penitentiary and I ain't going back." (JA 2065). With Gary driving, the three left the area and drove to a store where the defendant bought beer with the money they had taken from Alex. (JA 2066). They then drove to the river and threw away items they believed contained their fingerprints: Alex's clothing and backpack and the plastic cover over the car's speedometer. (JA 2067).

They discussed where to go to hide out and the defendant suggested that they stay with friends of his in West Virginia. (JA 2070-2071). To obtain money for the getaway, they drove to the H&L Market in Eggleston in Giles County to rob it. When they arrived, they argued over who would carry the gun inside. (JA 2069). The defendant said that he had done "what he had to do already," so Gary carried the pistol inside. (JA 2071). The defendant went in with an eight-inch knife. (JA 2553). They entered the store, held the owners at gun and knife point and robbed them

of $425.00 in cash, as well as food stamps, a radio, beer, tobacco, gloves and sunglasses. (JA 2479-2490, 2547-2556). After the robbery, they drove to a railroad trestle where they counted the money, divided it up and decided it was not enough. (JA 2075).

With Gary driving, they then went to the M&W Market in Pembroke. Gary and Mark went into the store and Gary held the pistol up to the clerk and demanded her money. (JA 2575). The defendant remained in the car. (JA 2076, 2573). The owner, Bill Williams, came into the store and knocked the gun out of Gary's hand, but Gary retrieved it and continued to demand money. (JA 2576-2577). The clerk handed over a money bag filled with change and the robbers left the store. Williams told the clerk to call the police, ran to his car and pursued the three robbers long enough to get their license plate number. (JA 2580). The defendant was driving the car, Mark was in the passenger seat and Gary was in the back seat. (JA 2079). When they saw Williams in pursuit, Gary pointed the rifle out of the window and fired it. (JA 2079-2080). The shot did not result in injury to any person or property. (JA 2586).

Officer Price of the Giles County Sheriff's Department and Officer Tilley of the Pearisburg Police Department each had responded to the scene of the Eggleston robbery and were on their way to the reported second robbery in Pembroke when they came upon the robbers' car headed towards them. (JA 1648, 1703). The car had stopped due to engine trouble and the defendant, Mark and Gary were attempting to remove the guns, radio, beer and other evidence from the car. (JA 2080-2081). Gary ran a few yards down an embankment and hid with the rifle. (JA 2081). Mark ran away through the woods.

The defendant was apprehended as he got out of the car, armed with the shotgun. (JA 1704-1705). Tilley and Price disarmed the defendant and a search disclosed the knife in his pants pocket. (JA 1649-1650). Upon questioning, the defendant falsely told them that there were three others with assault weapons, that one of them was named Mike Rader and that he (the defendant) was an undercover officer with the Montgomery County Sheriff's Office who had been picked up by the

others while he was hitchhiking. (JA 1650-1651).

Several officers arrived at the scene and began to search for the other suspects. The officers heard Gary crying down in a ditch about fifty feet from the car. (JA 1875). Gary was sitting down with the barrel of the rifle up against his head. (JA 1858). The officers talked Gary into surrendering. The defendant asked the officers if he could use their loudspeaker to talk to his brother and he was allowed to do so. (JA 2186). The defendant called Mark by name, asked him to "come out" and said, "You're not the one that's really in trouble here. You're not the one that's really done anything wrong." (JA 2187).

Chief Gautier of the Pembroke Police Department received a call that a suspect had been seen breaking into a house nearby and walking towards Blacksburg on Route 460. (JA 1885). The officers found Mark a short time later walking along Route 460. Upon apprehension, he falsely identified himself as Mark Rader. (JA 1886).

The defendant was placed in a police car while the search for the others proceeded. Chief Whitsett of the Pearisburg Police Department was standing guard alongside the car in which the defendant sat. (JA 2194). At that time, the only crimes the police knew about were the two robberies in Eggleston and Pembroke. (JA 2198). The window was down a few inches and the defendant called him over and asked if Whitsett "would do him a special favor." The defendant asked him if he would put the barrel of the officer's shotgun in the defendant's mouth and pull the trigger. (JA 2196). Whitsett told him he could not oblige and asked the defendant "if I [Whitsett] looked like a murderer?" (Id.). Then the defendant said something to prompt Whitsett to ask, "What does a murderer look like anyway?" to which the defendant responded, "me." (JA 2197). The defendant then stated that "he was going to hell to meet his [other] brother" who had committed suicide eight years before. (Id.).

The defendant was taken to the Giles County Sheriff's Office and was interviewed by Officer Price. The defendant said he was with his younger brother Mark, Gary Barker and one

Mike Rader, and that the others had committed the robberies in Eggleston and Pembroke. (JA 1662-1676). He stated that he was forced at gunpoint to participate in the robberies and he made no mention of the larceny of the guns from Danny Saunders' house or the murder and robbery of Alex DeFilippis. (JA 1666, 1674).

After his interview, Price asked the defendant if he would submit to a Gun Shot Residue test. (JA 1678-1679). The defendant declined the request and began to rub his hands together and on his pants legs. (JA 1679, 1926-1927).

Price then interviewed Gary Barker about the robberies. During the interview Price learned from a police dispatcher that the car the trio had been driving had been reported stolen and its owner abducted. (JA 1680). Price asked Barker about the car and Barker became "very emotional" and said that "a bad thing had happened." (JA 1681). Both Mark and Gary told the police what had happened, including the fact that the defendant had shot and killed Alex. Gary drew a map directing the officers to the location of Alex's body and later went with Officer Fleet of the Montgomery County Sheriff's Office to the area of the New River where they had discarded Alex's clothing. (JA 1771).

The officers also recovered the murder weapon about seventy-five feet away from Alex's car in a ditch. (JA 1907). The day after the murder, a citizen found Alex's wallet about a quarter of a mile from Alex's car in the direction of Pembroke. (JA 1888).

When the defendant was arrested, he had on his person several coins which had been stolen from Saunders' house. (JA 1920). Alex's watch was recovered from the back of Alex's car. (JA 1780). The bullet recovered from Alex's brain was determined to have the same class characteristics as bullets fired from the .38-caliber revolver stolen from Saunders' house. (JA 3523).

A forensic expert determined that there was blood on the bottom right leg of the defendant's blue jeans that were worn on December 5, but the amount of blood did not permit a DNA test to be

performed. (JA 2018-2019). Blood found on Gary Barker's underwear was determined by DNA testing to be his own blood. (JA 2014). No blood was found on Mark Lilly's clothing. (JA 2007).

At trial, Gary Barker testified extensively against the defendant. (JA 2026 et seq.). Mark Lilly was called to testify but refused to do so under the Fifth Amendment. (JA 2243-2244). The trial court found Mark Lilly to be unavailable for purposes of the hearsay exception for declarations against penal interest and permitted the Commonwealth to introduce into evidence Mark Lilly's tape-recorded pretrial confessions made to the police. (JA 2253-2282). The trial court made the following findings:

> Gentlemen, in response to the defendant's motion and considering the arguments herein, as well as the case law submitted by both parties, the Court finds as follows:
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> The Commonwealth has the burden to prove the unavailability of Mark Lilly as a witness. Should the Commonwealth call Mark Lilly, if Mark Lilly is sworn and if Mark Lilly takes a seat in the witness box and thereafter refuses to answer any questions asserting his Fifth Amendment right against self-incrimination, then in those events, the Commonwealth has met its burden in showing the unavailability of Mark Lilly as a witness. If on the other hand the Commonwealth does not call Mark Lilly as a witness, then her burden would not be met and these statements will not be admitted pursuant to the hearsay rule. It's well-settled in this Commonwealth that a declaration against penal interest is a recognizable exception to the hearsay rule. However, such a declaration is admissible only upon showing that the declaration is in fact reliable. And in considering whether or not such statements made by Mark Lilly to the officers is reliable and trustworthy, the Court looks at the evidence and exhibits before it and the facts and circumstances of this particular case. In addition, the Court further looks to examine whether there is any other substantial link to connect Mark Lilly with the crime other than the statements that are at issue here. In so doing, the Court finds that Mark Lilly's statements weren't [sic] against his penal interest and that they are reliable and trustworthy. Further, the Court finds that these statements do not violate the confrontation clause when they are admitted as hearsay under the quoted exception, which is firmly rooted. The Court will, therefore, following the precedent established within this Commonwealth, admit these statements in whole.
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> * * *
>
> All right, gentlemen, by Mr. Mark Lilly's assertion of his Fifth Amendment Rights, after having been sworn and after having taken the witness stand and assuming the protection of those rights, then the Court does find that the Commonwealth has met its burden in determining the unavailability of his testimony, so, therefore, in conjunction with the Court's prior ruling that finding is made.

(JA 2226-2227, 2244-2245).

The defendant did not testify in his own defense, but rather put on witnesses to say that Gary Barker had a reputation for untruthfulness (JA 2417, 2627), that Gary had made statements to the effect that he would kill his best friend and anyone who tried to arrest him (JA 2525, 2529), and that the defendant was not seen in actual possession of the stolen guns at all times. (JA 2384, 2435). The jury returned guilty verdicts on all nine charges. (JA 2784-2785).

During the separate sentencing hearing, the Commonwealth presented both record and testimonial evidence of the defendant's extensive criminal history, including over thirty convictions for crimes ranging from public drunkenness to assaults, breaking and entering, larceny and malicious wounding. (JA 2818-2868). The defendant put on a variety of mitigation evidence, including a mental health expert and family members who described his childhood and abusive father. Dr. Nelson, a forensic psychologist, admitted that he could not say that the defendant never would commit another violent act. (JA 2921-2922). The jury found Lilly a "future danger" and his crime "vile" in that it involved torture, depravity of mind and aggravated battery, and sentenced him to death. (JA 3017).

During the post-sentencing hearing in which the probation officer's report was considered, the defendant presented the testimony of, among others, Mark Lilly. Mark testified that he had lied to his attorneys and to the police and that it was he, rather than his brother, who had ***robbed*** Alex DeFilippis. (JA 3095-3101). Mark denied shooting Alex, however (JA 3098), stated that he did not know who shot Alex and that he could not say that his brother had not shot him. (JA 3102). At the conclusion of the hearing, the trial court sentenced Lilly in accordance with the jury's verdicts.

On appeal, Lilly made two arguments with respect to the admission of Mark's statements. He first argued that, as a matter of state law, the hearsay exception for declarations against penal interest did not, and should not, apply to declarations made by any witness which the

Commonwealth sought to introduce against the defendant. (Resp. App. B-7 to B-11). Lilly's primary contention was that the Virginia Supreme Court had erred when it allowed such hearsay in Chandler v. Commonwealth, 249 Va. 270, 455 S.E.2d 219 (1995). With the exception of a reference to "the confrontation clause, the fifth, sixth, and fourteenth Amendments" in the heading of his argument, and one reference to Chambers v. Mississippi, 410 U.S. 284 (1973), in the argument, Lilly's first argument was devoid of any reference to federal law.

Lilly's second argument below was that, again under Virginia case law, Mark's pretrial statements were not truly against his penal interest. (Resp. App. B-11 to B-17). Lilly recited the federal constitutional amendments in the heading to his argument and contended at the end of his argument in conclusory fashion that the Constitution had been violated because he had not been able to confront Mark Lilly at trial. (Resp. App. B-11, B-16). Lilly's argument, however, was based upon state law governing the issue as expounded in two decisions from the Virginia Supreme Court on the state evidentiary rule. (Resp. App. B-11, B-12). Lilly did not rely on a single federal case. Indeed, nowhere in his opening brief did Lilly address the trial court's finding that the hearsay exception was firmly rooted in Virginia law or the fact that its finding that the evidence was reliable relied in part on corroborating evidence.

The Commonwealth's response to these arguments was three-fold: (1) Chandler had been decided correctly and there was no *per se* constitutional bar against such evidence; (2) the evidence was admissible because it came in under a firmly rooted exception to the hearsay rule and because it was reliable considering all the evidence; and (3) any error was harmless. (Resp. App. C-1 to C-9).

Lilly's reply brief filed below recited two cases from this Court for the general principle that accomplice's confessions are presumptively unreliable – Lee v. Illinois, 476 U.S. 530 (1986) and Williamson v. United States, 512 U.S. 594 (1994) – and then argued that the Commonwealth's harmless error argument had no merit. (Resp. App. D-1 to D-4). Nowhere in the reply brief did

Lilly take issue with the Commonwealth's argument that the hearsay exception was firmly rooted or that the corroborating evidence demonstrated the reliability of the hearsay evidence.

The Virginia Supreme Court made the following findings in its decision affirming the trial court's evidentiary ruling:

> At trial, Mark Lilly was called as a witness for the Commonwealth, but invoked his right against self-incrimination under the Fifth Amendment. Asserting that Mark Lilly was unavailable as a witness, the Commonwealth sought to introduce his pre-trial statements to police as declarations against his penal interest. Lilly objected on the ground that these statements did not fall within this hearsay exception because they were self-serving and tended to exculpate Mark Lilly by shifting responsibility to Lilly and Barker for the majority of the criminal acts the three men committed.
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> In his statements, Mark Lilly contended that he stole only liquor during the breaking and entering of the house of Lilly's friend, but that Lilly and Barker "got some guns or something." He further directly implicated Lilly as the instigator of the carjacking, saying that Lilly "wanted to get him another car." In the statements, Mark Lilly directly implicated Lilly as the triggerman in the murder and asserted that he and Barker "didn't have nothing to do with the shooting [of DeFilippis]."
>
> To be admissible as a declaration against penal interest, an out-of-court statement must be made by an unavailable declarant. Ellison v. Commonwealth, 219 Va. 404, 408, 247 S.E.2d 685, 688 (1978). "The law is firmly established in Virginia that a declarant is unavailable if the declarant invokes the Fifth Amendment privilege to remain silent." Boney v. Commonwealth, 16 Va. App. 638, 643, 432 S.E.2d 7, 10 (1993); see also Newberry v. Commonwealth, 191 Va. 445, 462, 61 S.E.2d 318, 326 (1950).
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> To be considered as being against the declarant's penal interest, it is not necessary that the statement be sufficient on its own to charge and convict the declarant of the crimes detailed therein. Chandler v. Commonwealth, 249 Va. 270, 278-79, 455 S.E.2d 219, 224-25, cert. denied, 516 U.S. 889 (1995). Rather, the statement's admissibility is based upon the subjective belief of the declarant that he is making admissions against his penal interest and upon other evidence tending to show that the statement is reliable. Id.
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> Lilly concedes that statements of a declarant unavailable at trial are admissible if they qualify under the exception to the rule for declarations against penal interest. He asserts, however, that prior to Chandler, this exception was used only to permit the introduction of exculpatory evidence proffered by the defendant. In Lilly's view, Chandler improperly enlarged the exception to permit the

Commonwealth to introduce statements of a co-participant which, though nominally against penal interest, actually seek to limit the declarant's culpability by implicating others, and, thus, are inherently unreliable. Accordingly, Lilly urges that Chandler was wrongly decided and should be overturned. We disagree.

We recognize that Ellison, Newberry, and other cases that applied this hearsay exception prior to Chandler involved the admission of such statements proffered by defendants for their exculpatory value. However, as we said in Ellison, the admission of such statements must be left to the sound discretion of the trial court, to be determined upon the facts and circumstances of each case. But, in any case, once it is established that a third-party confession has been made, the crucial issue is whether the content of the confession is trustworthy. And determination of this issue turns upon whether, in the words of Hines [v. Commonwealth, 136 Va. 728, 748, 117 S.E. 843, 849 (1923)], the case is one where "there is anything substantial other than the bare confession to connect the declarant with the crime." 219 Va. at 408-09, 247 S.E.2d at 688 (emphasis added).

Thus, in determining the admissibility of a statement against penal interest made by an unavailable declarant, whether offered by the Commonwealth or the defendant, the crucial issue to be resolved by the trial court is the reliability of the statement in the context of the facts and circumstances under which it was given. Here, the record clearly shows that Mark Lilly was cognizant of the import of his statements and that he was implicating himself as a participant in numerous crimes for which he could be charged, convicted, and punished. Elements of Mark Lilly's statements were independently corroborated by Barker's testimony, by the physical evidence, and by the correspondence between Mark Lilly's account and the accounts of other persons acquired by law enforcement authorities. Thus, the statements were clothed in the necessary indicia of reliability to overcome the hearsay bar, and their admission rested well within the trial court's sound discretion. That Mark Lilly's statements were self-serving, in that they tended to shift principal responsibility to others or to offer claims of mitigating circumstances, goes to the weight the jury could assign to them and not to their admissibility.

Lilly further asserts that the admission of Mark Lilly's statements violated his right of confrontation since he was denied the right to cross-examine the declarant. We disagree. The right of confrontation is not absolute. A statement sufficiently clothed with indicia of reliability is properly placed before a jury even though there is no confrontation with the declarant. Dutton v. Evans, 400 U.S. 74, 89 (1970).

> [W]here proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied.
>
> . . . .
>
> To exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness, given that the Confrontation Clause has as a basic purpose the promotion of the "'integrity of the factfinding process.'" . . . [A] statement that qualifies for admission under a "firmly rooted" hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability.
>
> White v. Illinois, 502 U.S. 346, 356-57 (1992) (citations omitted). As noted above, admissibility into evidence of the statement against penal interest of an unavailable witness is a "firmly rooted" exception to the hearsay rule in Virginia. Thus, we hold that the trial court did not err in admitting Mark Lilly's statements into evidence.* See Randolph v. Commonwealth, 24 Va. App. 345, 353, 482 S.E.2d 101, 105 (1997); Raia v. Commonwealth, 23 Va. App. 546, 552, 478 S.E.2d 328, 331 (1996).

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* Lilly further argues that he was unfairly prejudiced by the comments of the police contained within Mark Lilly's statements which he contends placed emphasis on Mark Lilly's truthfulness. However, the record shows that the officers merely encouraged Mark Lilly to tell them the truth.

Lilly, 225 Va. at 572-575, 499 S.E.2d at 533-534.

After the Virginia Supreme Court issued its decision, Lilly petitioned for rehearing of the hearsay claim on several new grounds. Lilly argued for the first time that this Court's "joint trial/hearsay" cases and its federal rules cases applied to the hearsay issue in his single-defendant trial. (Resp. App. E-1 to E-2).[2] Lilly also argued for the first time that Virginia's hearsay exception for declarations against penal interest was not "firmly rooted" in the law. (Resp. App. E-3). Finally, Lilly argued – again for the first time – that under Idaho v. Wright, 497 U.S. 805 (1990), a determination of the reliability of the hearsay statements for purposes of admission under Virginia's hearsay exception could not, as a matter of law, take into consideration evidence outside of Mark's statements that corroborated and validated the truth of the statements Mark had made. (Resp. App.

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[2] Lilly relied on Bruton v. United States, 391 U.S. 123 (1968) and Williamson v. United States, 512 U.S. 594 (1994).

E-6). The Virginia Supreme Court denied the petition for rehearing in an unpublished, summary order. (Resp. App. F).

REASONS WHY THE WRIT SHOULD BE DENIED

I. LILLY'S CERTIORARI ARGUMENTS WERE NOT FAIRLY PRESENTED TO THE VIRGINIA SUPREME COURT.

In the Supreme Court of Virginia, Lilly briefed and argued thirty-four assignments of error. (Resp. App. B-1 to B-6). As shown above, Lilly made only two arguments pertaining to the evidentiary ruling allowing Mark Lilly's pretrial statements. Even a cursory review of Lilly's arguments made below demonstrates that they are not the same arguments he now makes in his certiorari petition. In the court below, Lilly argued primarily that Virginia's hearsay exception for declarations against penal interest did not apply at all to statements admitted against a defendant. Lilly concluded without analysis that such an exception would violate the Confrontation Clause. (Resp. App. B-11). Lilly makes no such argument in his certiorari petition.

Lilly also argued below that, under Virginia's Chandler decision describing the hearsay exception, Mark Lilly's particular statements did not qualify because they allegedly were not "against his penal interest." (Resp. App. B-12). Lilly again concluded, without analysis, that the Confrontation Clause had been violated. (Resp. App. B-16). Lilly makes no such state law argument in his certiorari petition.

Lilly's 31-paged certiorari petition is devoted solely to the evidentiary hearsay claim. In it, Lilly essentially makes three arguments: (1) Under Lee v. Illinois, 476 U.S. 544 (1986), Bruton v. United States, 391 U.S. 123 (1968) and Williamson v. United States, 512 U.S. 594 (1994), Mark Lilly's pretrial statements were *per se* inadmissible and "no court" ever has upheld the admission of such statements; (2) the hearsay exception is not "firmly rooted," and the federal courts of appeals allegedly are "split" over this issue; and (3) Mark Lilly's statements allegedly are unreliable if

"collateral" evidence corroborating their validity is ***not*** considered, and the federal courts of appeals and state courts allegedly are "split" over the issue of whether "collateral" evidence can be considered.

These arguments simply were not presented to the Virginia Supreme Court. As shown in Lilly's opening and reply briefs filed below, these three arguments were not made. To the extent they were raised in Lilly's ***petition for rehearing***, those arguments were not considered by the Virginia Supreme Court because they were not made in the first place. A petition for rehearing, by definition, presupposes that the matter has been "heard" in the first instance and the Virginia Supreme Court, like the federal courts, will not consider new matters on rehearing. See Nicholas v. Nicholas, 100 Va. 660, 665, 42 S.E. 866 (1902); Malady v. United States, 120 F.3d 119, 120 (8th Cir. 1997); United States v. Martinez 96 F.3d 473, 475 (11th Cir. 1996); United States v. Klotz, 503 F.2d 1056 (8th Cir. 1974); Weigand v. Wingo, 380 F.2d 1022, 1023 (6th Cir. 1967); Can v. F.T.C., 302 F.2d 688, 692 (1st Cir. 1962).

This Court does not sit to review issues that were not "properly" and "timely" raised in the lower court. Sup. Ct. R. 14(1)(g)(i) (petitioner must "show that the federal question was timely and properly raised"); Yee v. Escondido, 503 U.S. 519, 532 (1992); Illinois v. Gates, 462 U.S. 213, 218-220 (1983); cf. Duncan v. Henry, 513 U.S. 364, 365 (1995) (mere similarity of claims insufficient to satisfy exhaustion requirement of 28 U.S.C. § 2254). A fair review of Lilly's briefs filed below discloses that he did not formulate his current arguments until after the Virginia Supreme Court had decided his case on different grounds. This Court may not grant certiorari to determine issues in the first instance. The judgment of the Virginia Supreme Court that Lilly asks this Court to review simply did not rest on the issues he presents in his certiorari petition.

II. THE QUESTION OF WHETHER THE EXCEPTION FOR DECLARATIONS AGAINST PENAL INTEREST IS "FIRMLY ROOTED" HAS NO EFFECT ON LILLY'S CASE.

(Pet. Arg. B)

Even if Lilly had properly preserved his argument, it would present no "compelling" reason for a grant of certiorari. See Sup. Ct. R. 10. While it is true that, as a matter of federal constitutional law, hearsay may be admitted without violating the Confrontation Clause simply because it falls within a "firmly rooted" exception to the hearsay rule, see Ohio v. Roberts, 448 U.S. 56, 66 (1980), Virginia does not permit such liberal admission of hearsay evidence. Under settled Virginia law, hearsay evidence may not be admitted under the exception for declarations against penal interest unless the evidence meets three requirements: (1) the declarant must be unavailable; (2) the statement must be inculpatory of the declarant; ***and*** (3) the statement must be reliable and trustworthy. See Chandler, 249 Va. at 279, 455 S.E.2d at 224; Morris v. Commonwealth, 229 Va. 145, 147, 326 S.E.2d 693, 694 (1985); Ellison v. Commonwealth, 219 Va. 404, 408, 247 S.E.2d 685, 688 (1978); Hines v. Commonwealth, 136 Va. 728, 745, 117 S.E. 843, 847-848 (1923). Indeed, in Lilly's case, the Virginia Supreme Court followed its well-established law: it found that Mark Lilly was unavailable as a witness;[3] that he knew his pretrial statements implicated him in the crimes described; and that the statements "were clothed in the necessary indicia of reliability." Lilly, 255 Va. at 573-574, 499 S.E.2d at 534.

The Virginia Supreme Court also found that the hearsay exception was "firmly rooted" in Virginia law, id. at 575, 499 S.E.2d at 534, but that finding is superfluous to the Court's ultimate holding with respect to reliability. In other words, hearsay evidence in every Virginia case, including Lilly's, must be analyzed for reliability based upon the particular facts of the case. This Court has held that hearsay evidence may be admitted if it ***either*** meets the requirement of a "firmly rooted" exception ***or*** if it is independently reliable and trustworthy. See Roberts, 448

[3] The petitioner never has contested this fact.

U.S. at 65-66. Because Virginia requires the "reliability" analysis in every case, a Virginia case would be an entirely inappropriate vehicle for this Court to determine whether this particular hearsay exception is "firmly rooted." Therefore, regardless of how this Court were to resolve the purported split regarding whether the exception is "firmly rooted," it would have no effect on Lilly's case because the Virginia Supreme Court determined that the statement in question was reliable.[4]

III. LILLY'S "PER SE ERROR" ARGUMENT IS A MISSTATEMENT OF THE LAW.

(Pet. Arg. A)

Even if Lilly had preserved his argument below, this Court should not grant certiorari to review what is, at best, a non-issue. Lilly states in the first sentence of his argument (Pet. 17) that custodial confessions of a co-defendant are inadmissible under the Confrontation Clause. Implicit in his argument is an assertion that this Court essentially has outlawed the use of such hearsay statements. To the contrary, however, this Court expressly has held that such evidence ***may*** be admissible if it is found to bear sufficient indicia of reliability. In Williamson v. United States, 512 U.S. 594, 603 (1994), this Court held that "[e]ven the confessions of arrested accomplices may be

[4] To be sure, the hearsay exception is "firmly rooted" in Virginia law, dating back to 1923. See Hines, 136 Va. at 745, 117 S.E. at 848. However, the petitioner's list of cases supposedly finding the exception "firmly rooted" is grossly inaccurate: he cites Jennings v. Maynard, 946 F.2d 1502 (10th Cir. 1991), but the Tenth Circuit later explained that the "firmly rooted" holding in Jennings was *dicta* and that the Tenth Circuit did not believe the exception "firmly rooted" for custodial confessions of co-defendants. Earnest v. Dorsey, 87 F.3d 1123, 1131 (10th Cir. 1996). Lilly cites three other cases – United States v. Keltner, 147 F.3d 662 (8th Cir. 1998), United States v. York, 933 F.2d 1343 (7th Cir. 1991) and United States v. Taggart, 944 F.2d 837 (11th Cir. 1991) – but in each case, the court of appeals engaged in a "reliability" analysis even after finding the hearsay exception "firmly rooted." And the two final cases Lilly cites are ones which cannot fairly be counted in the list: United States v. Katsougrakis, 715 F.2d 769 (2d Cir. 1983) was decided before this Court in Lee v. Illinois, 476 U.S. 530, 544 n.5 (1986) hinted that the exception may not be "firmly rooted" for co-defendants' confessions; and United States v. Seeley, 892 F.2d 1 (1st Cir. 1989) merely followed the ruling in Katsougrakis. Thus, even though irrelevant to Lilly's (or any Virginia) case, the purported "split" over the "firmly rooted" issue is not a "split" at all: the lower courts uniformly treat confessions of co-defendants differently from other hearsay and, whether or not the general exception is "firmly rooted," hearsay evidence of a co-defendant's confession is analyzed by all courts for indicia of reliability and trustworthiness before it is allowed into evidence.

admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor." See also id. at 605 (not deciding constitutional issue but noting that "genuinely self-inculpatory" nature of statement "is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause"). In Lee, the Court made clear that the presumption of unreliability generally associated with a co-defendant's confession is rebuttable, and that such evidence "may nonetheless meet Confrontation Clause reliability standards if it is supported by a 'showing of particularized guarantees of trustworthiness.'" 476 U.S. at 543, quoting Roberts, 448 U.S. at 66.

Indeed, in Dutton v. Evans, 400 U.S. 74 (1970), this Court found no constitutional error in the admission of a co-defendant's hearsay statement, under facts strikingly similar to Lilly's case: Evans, Williams and Truett murdered three police officers in Georgia; Evans was tried separately; Truett was the principal witness against Evans, describing in detail the murders; Williams did not testify; an inculpatory statement made by Williams to another inmate was admitted into evidence through the inmate witness. 400 U.S. at 77-78. Evans made a "*per se*" argument similar to the one Lilly has made, and relied on several of the cases Lilly relies on for his "*per se* error" argument: Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965); Bruton v. United States, 391 U.S. 123 (1968). See Dutton, 400 U.S. at 83-84. This Court carefully distinguished each case: Pointer involved the use at trial of the transcript of the robbery victim's preliminary hearing testimony, the robbery victim was the chief witness and Pointer had no counsel representing him at the preliminary hearing; Douglas involved the "flagrant violation" of allowing the prosecutor to read the accomplice's confession under the guise of refreshing the accomplice's recollection even after he had refused to testify under the Fifth Amendment; and Bruton involved the question of whether a jury in a ***joint*** trial could follow instructions to disregard admittedly inadmissible, albeit fully presented, hearsay evidence of the co-defendant's confession. Indeed, this Court noted that "[t]here was not before us in Bruton 'any recognized

exception to the hearsay rule,'" and the Court was careful to emphasize that "we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." Dutton, 400 U.S. at 84-86, quoting Bruton, 391 U.S. at 128 n.3.

The particular hearsay exception at issue in Dutton was for declarations of co-conspirators and this Court approved the admission of the hearsay despite the fact that the Georgia exception was broader than the exception for co-conspirator statements under the federal rules. 400 U.S. at 83. This Court found the hearsay constitutional because the facts of the particular case and the context of the hearsay among all the other evidence in the case demonstrated its reliability. Id. at 87-89. Significant among the factors indicating reliability, moreover, was the fact that the hearsay was against the penal interest of the declarant. Id. at 89.

Of course, contrary to Lilly's erroneous exaggeration that no court ever has admitted such evidence, many courts have in fact found admissible the type of hearsay admitted in Lilly's case. See, e.g., United States v. Workman, 860 F.2d 140 (4th Cir. 1988); United States v. Smith, 792 F.2d 441 (4th Cir. 1986); United States v. Keltner, 147 F.3d 662 (8th Cir. 1998); United States v. Taggart, 944 F.2d 837 (11th Cir. 1991); Earnest v. Dorsey, 87 F.3d 1123 (10th Cir. 1996); Oregon v. Neilsen, 853 P.2d 256 (Or. 1993).

The simple fact is that, despite Lilly's isolating from this Court's cases those passages which question the reliability of co-defendants' confessions as a ***general*** matter, the law governing the admissibility of such hearsay evidence is settled. The lower courts, including the Virginia Supreme Court, know that care must be taken with such evidence to assure its reliability. That principle, however, never has ***prohibited*** such evidence as a matter of law; rather, each case must be determined on its own facts. Lilly's argument thus is inappropriate for certiorari review. See Ross v. Moffitt, 417 U.S. 600, 616-617 (1974) (certiorari inappropriate merely to review application of existing precedent to facts); United States v. Johnston, 268 U.S. 220, 227 (1925) (same).

IV. THE "INDICIA OF RELIABILITY" FOUND TO SUPPORT THE ADMISSION OF MARK LILLY'S STATEMENTS ARE FACTUAL MATTERS NOT APPROPRIATE FOR CERTIORARI REVIEW. (Pet. Arg. C)

Lilly's last argument is that Mark Lilly's pretrial statements could not be believed due to perceived inconsistencies between the statements and other evidence, and based upon Mark Lilly's post-trial recantation.[5] Lilly's arguments were made in the trial court and in the Virginia Supreme Court. The two state courts rejected Lilly's arguments, however, because the evidence, facts and circumstances of this particular case, including the audio taped recordings and transcripts of the taped recordings, demonstrated that Mark Lilly's statements were reliable and trustworthy.

This Court has stated that the reliability determination for hearsay evidence is a "fact-intensive inquiry." Williamson, 512 U.S. at 604; see also id. at 621 (Kennedy, J., concurring) ("a difficult, factbound determination"). See also California v. Green, 399 U.S. 149, 168-169 (1970) (remand of hearsay issue to state court because "[i]ts resolution depends much upon the unique facts in this record, and we are reluctant to proceed without the state court's views of what the record actually discloses"). Lower federal courts recognize this principle by their application of a "clearly erroneous" standard of review to a "finding of the trial judge on the guarantees of trustworthiness" of hearsay. Workman, 860 F.2d at 144. The Virginia Supreme Court employs a

[5] Lilly's reliance on his brother's post-sentencing hearing testimony in which his brother said he had lied to the officers, may not be considered now because it obviously could not have been considered at the time the trial court ruled upon the admissibility of the statements. In any event, it certainly does not undermine the reliability of the original statements. Mark's "recantation" not only was thoroughly impeached by his admission that he had decided to testify only ***after*** he had been sentenced, ***after*** his family had blamed him for his brother's conviction and ***after*** his mother had filed in court to take away custody of his child (JA 3101-3102), but also by the fact that the "recantation" neither exonerated his brother in the murder of Alexander DeFilippis nor even purported to identify the triggerman. (JA 3102-3103). Significantly, Mark's implausible "recantation" did not persuade the trial court or the Virginia Supreme Court to set aside the jury's verdict.

similar standard of review: a reliability determination lies within "the sound discretion of the trial court, to be determined upon the facts and circumstances of each case." Ellison, 219 Va. at 408, 247 S.E.2d at 688; see also Williamson, 512 U.S. at 621 (Kennedy, J., concurring) ("District judges, who are close to the facts and far better able to evaluate the various circumstances than an appellate court, therefore must be given wide discretion to examine a particular statement....").

This Court does not sit to review or redetermine facts. See Sup. Ct. R. 10; Kyles v. Whitley, 514 U.S. 419, 458 (1995) (Scalia, J., dissenting) ("an intensively fact-specific case in which the court below unquestionably applied the correct rule of law and did not unquestionably err [is] precisely the type of case in which we are ***most*** inclined to deny certiorari") (emphasis in original). Lilly's fact-bound "reliability" argument, however, asks this Court to do just that. This Court should refuse to redecide the factual findings of the two lower courts. See Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 318 n.5 (1985) (factual findings by the trial court upheld by the appellate court should not be reviewed under the "two court" rule).

In any event, the two lower state courts properly determined that Mark Lilly's statements were reliable. This Court stated in Williamson that "the very fact that a statement is genuinely self-inculpatory...is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible." 512 U.S. at 605. Contrary to Lilly's repeated assertion that Mark denied any criminal liability and tried to cast blame on his brother, the transcripts of Mark's two interviews with the officers discredit Lilly's assertions.

First, Mark's statements given to Officers Price, Hamlin and Fleet obviously subjected him to criminal liability and, therefore, were against his penal interest. (JA 2253-2282, 2318-2332). The officers expressly warned him before each statement that what he said ***would*** be used against him if charges were brought. (JA 2255, 2318). Mark not only admitted that he participated in the Saunders break-in, that he went along with Alex's abduction, stood by while the murder occurred and participated in the subsequent two "getaway" robberies, but he also told

the officers that ***he knew his statements to them would result in charges of robbery and murder***, both of which carried possible life sentences. (JA 2281, 2324).[6] There can be no question about the fact that Mark Lilly knew his statements were against his penal interest.[7]

Second, although Lilly contends that Mark made statements which were internally inconsistent or contradictory to Gary Barker's testimony, the inconsistencies were on essentially minor points: what Mark stole in the break-in and whether he got out of the car at the murder scene. Petitioner's complaints about inconsistencies, moreover, were matters which could have been, and in many instances were, pointed out to the jury. (JA 2734-2737, 2746, 2748). The hearsay that may be admitted without violating the defendant's confrontation rights is that which is sufficient "to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.'" Roberts, 448 U.S. at 65-66. Lilly's jury, which had seen and heard the tape-recorded police interviews, had a sufficient basis upon which to determine whether Mark was telling the truth. The statements, therefore, met the threshold "reliability" precondition to admission into evidence. See United States v. Shaw, 69 F.3d 1249, 1253 (4th Cir. 1995) ("this trustworthiness requirement – which serves as a surrogate for the defendant's in-court cross-examination – is

[6] Lilly inaccurately states that the officers threatened Mark with particular sentences. The only discussion of what charges would be brought was in response to Mark's question. Officer Price told him only that he would be charged with two armed robberies in his county; the officer did not discuss sentences at all and told Mark he did not know what charges from other counties would be brought. (JA 2281).

[7] To the extent Lilly argues that Mark's statements should have been separated out or categorized as to whether each phase was inculpatory or collateral-to-inculpatory, as this Court found must be done under FRE 804(b)(3), see Williamson v. United States, his argument presents no federal constitutional issue. This Court made clear in Williamson that it was not deciding any constitutional issue, 512 U.S. at 605, and further made clear that Congress was free to draft a rule of evidence allowing hearsay statements which are collateral to the actual inculpatory statements against penal interest. Id. at 600. Virginia follows the common law rule that allows in the declarant's entire statement containing declarations against penal interest if the entire statement is found to be reliable. See id., 512 U.S. at 615 (Kennedy, J., concurring) ("From the very beginning of this exception, it has been held that a declaration against interest is admissible, not only to prove the disserving fact stated, but also to prove other facts contained in collateral statements connected with the disserving statement.") (quoting Jefferson, 58 Harv. L. Rev. 1, 57 (1944)).

satisfied if the court can conclude that cross-examination would be of 'marginal utility'") (quoting Idaho v. Wright, 497 U.S. 805, 820 (1990)).

Third, the fact that the statements were given voluntarily, after Miranda warnings, to law enforcement officers who tape-recorded them in formal interviews indicates their reliability because Mark surely knew that the officers could and would verify his statements with the surviving victim-witnesses as well as with Gary Barker and the defendant. See United States v. West, 574 F.2d 1131, 1135 (4th Cir. 1978) (declarant's interest in gaining favor with the officers "gave him every incentive to be extremely accurate in his reports" because he knew the officers would seek to corroborate and verify his reports).[8] The transcripts of Mark's statements disclose that the officers made no threats or promises to Mark. The officers, moreover, all were available at trial for cross-examination.

Fourth, the fact that Mark's statements implicated his own brother as the shooter, as opposed to Gary Barker, certainly is a strong indication of their reliability. (JA 2265-2266: in response to Officer Price's request to tell him who did the shooting, Mark stated, "Well, it's kinda hard cause he's my fucking brother man"; JA 2323: in response to Officer Hamlin's statement that they were trying to find out what happened to the murder victim, Mark said, "Yeah. Yeah, Man, something else, too. I'm going to be getting all these charges and that's my brother I'm telling on.").

Fifth, the fact that Mark's statements were corroborated on every material point by the trial testimony of Gary Barker (JA 2025-2150) and the other evidence in the case also demonstrates their trustworthiness. ***And yet another indication of the reliability of Mark Lilly's statements is the fact that neither Gary Barker nor the petitioner, to this day, ever has claimed that Mark was***

[8] Officer Price cautioned Mark to be truthful and take responsibility for his actions because if he did not, the court would not look at the confession "as it should." (JA 2257).

the shooter or even that Mark was in any manner more culpable than he had indicated in his pretrial statements.

Unlike the circumstances in Lee v. Illinois, where the co-defendant was reluctant to talk to the police until after he had been told that Lee had implicated him in the crime and that Lee wanted to "share the rap" with her, 476 U.S. at 544, Mark Lilly willingly and voluntarily told the officers what had happened shortly after his arrest. The officers never accused Mark of being the shooter and, for the most part, merely asked what had happened.

Unlike the circumstances in Douglas where the only direct evidence against the defendant was the confession of his co-defendant and where the prosecutor clearly engaged in misconduct, 380 U.S. at 416-417, Mark Lilly's statements were merely corroborative of the extensive testimony given by Gary Barker and the other evidence in the case, and ***no*** prosecutorial misconduct occurred. Unlike the circumstances in Pointer where the victim's hearsay again was the primary evidence against the defendant and where the defendant had been unrepresented by counsel at the preliminary hearing and thus had been unable to cross-examine the victim, Mark Lilly's statements were not the primary evidence and were in fact shown to be reliable by the circumstances of the interviews, by the statements themselves and by the corroborating evidence.

Indeed, unlike the typical co-defendant case in which one turns on the other for retribution or to gain favor with, or better treatment from, the authorities, here the record contains no such indications of untrustworthiness. Mark Lilly told the officers the truth about his own actions ***and only reluctantly described the actions of his brother***. Mark in fact refused to testify against his brother. He agreed to testify only after the trial was over and after his own family had blamed him for his brother's conviction. Even then, he only generally disclaimed his prior confession, refusing to change any material details. Mark's post-trial "recantation" was not believed by the judge who saw him testify. His statements given shortly after the crime spree are replete with indicia of their

reliability and the state courts violated no constitutional rule in allowing those statements into evidence.

V. THE "SPLIT" IN THE CIRCUIT COURTS OF APPEALS OVER THE USE OF CORROBORATING EVIDENCE INVOLVES NO CONSTITUTIONAL ISSUE RELEVANT TO LILLY'S CASE. (Pet. Arg. C(2))

Lilly's "split" argument is a confusing misreading of this Court's decisions in Idaho v. Wright and Williamson v. United States. Lilly actually makes two mutually exclusive arguments: (1) Idaho v. Wright allegedly barred the rule which the Virginia Supreme Court and other courts employ that before a hearsay statement against penal interest may come into evidence, it must be independently corroborated by other evidence and, thus, the Virginia Supreme Court erred under Wright when it found that independent evidence corroborated Mark Lilly's statements; and (2) there is a "split" in the lower courts on the issue of whether corroborative evidence may be considered. Obviously, if this Court already has decided the issue, as is contended by Lilly, then there can be no "split" of authority on the issue.

In fact, however, the "split" which Lilly has referenced does not even pertain to Lilly's case. Lilly states that "[i]n Williamson, this Court noted that the Courts of Appeal [sic] are divided regarding the use of corroborating evidence to establish a statement's reliability." (Pet. 29). Lilly, however, simply has misread the opinion. What Williamson noted was that some Courts of Appeals have read the second sentence of FRE 804(b)(3) to require corroboration for statements ***inculpating*** the accused, as opposed to ones ***exculpating*** the accused. 512 U.S. at 605. That "split" of authority over the statutory construction of a federal rule of evidence implicates no constitutional matter. Indeed, Williamson expressly disavowed a constitutional basis for its decision. Id.

Lilly's real argument is that the Virginia Supreme Court did not follow what Lilly perceives to be a requirement in Wright: that it was prohibited from considering the evidence

corroborating Mark Lilly's statements when it found the statements to be reliable. Lilly, however, never voiced this concern to the Virginia Supreme Court until he filed his petition for rehearing and, for the reasons stated above, that untimely argument could not have been considered by the Virginia Supreme Court, and it, therefore, may not be considered now.

In any event, Lilly's argument presents no "compelling" reason to grant certiorari. In Wright, this Court was faced with a different issue than the one in Lilly's case. In Wright, the Idaho Supreme Court had found that a 2 ½ year-old child's statements of sexual abuse given to an examining physician lacked the particiuarlized guarantees of trustworthiness necessary to satisfy the requirements of the Confrontation Clause. 497 U.S. at 813. The statements had been admitted at trial under Idaho's "residual" hearsay exception. The Idaho Supreme Court found that the statements were unreliable because the physician had not tape-recorded them, had asked leading questions and had a preconceived idea of what the child should say. Id. at 812-813.

In affirming the Idaho court's decision, this Court rejected the government's argument that evidence independent of the physician's interview demonstrated the reliability of the little girl's statements: the 5-year-old sister's similar claims of sexual abuse and physical evidence of abuse. Id. at 824. In so doing, the Court noted the particular danger in relying on independent evidence in child sex-abuse cases, e.g., physical evidence which does not necessarily identify the perpetrator. Id.

The Court in Wright did ***not*** hold that its "no corroborative evidence" ruling applied to all hearsay exceptions, much less to declarations against penal interest and, indeed, its decision in Williamson four years later gave some indication that the Wright ruling is ***not*** required under the Constitution in cases involving the hearsay exception for declarations against penal interest.[9] In Williamson, the Court declined to decide the constitutional confrontation issue presented, but equated a determination of whether a statement is self-inculpatory under FRE 804(b)(3) with a

[9] The majority opinions in Wright and Williamson both were authored by Justice O'Connor.

determination of whether a statement is reliable under the Constitution. 512 U.S. at 605. In the very next sentence, the Court noted that the Courts of Appeals are split over whether FRE 804(b)(3) ***requires*** a finding that corroborating evidence supports a hearsay statement under the penal interest exception, but found it unnecessary to resolve the split. Id.

Such a split, of course, would not need resolution at all if, as Lilly argues, Wright already had pronounced a binding constitutional rule. In other words, Lilly's attempt to extend Wright beyond its own facts and beyond the hearsay exception discussed therein, simply has no basis in this Court's decisions. If Wright swept as broadly as Lilly argues, then the Court could not have referred, as it did later in Williamson, to a "split" over the use of corroborative evidence under FRE 804(b)(3).

Moreover, the principles which supported the "no corroborative evidence" rule in Wright simply do not make sense in the context of the "declaration against penal interest" exception. In Wright, the very circumstances of the interview demonstrated the unreliability of the child's statements. In Lilly's case, and other "against penal interest" cases, the first element of the exception requires a finding that the statement itself is genuinely self-inculpatory and known to be so by the declarant; thus, it is the circumstance surrounding the statement itself that establishes reliability, not corroborative evidence. The additional ***requirement*** of corroboration[10] only enhances that reliability determination; it does ***not*** replace it, as was argued for (and rejected) under the different circumstances in Wright.

Consequently, Lilly simply is wrong when he asserts that Wright required courts to disregard corroborative evidence when considering statements against penal interest. He also is

[10] As shown above, Virginia has three requirements for admission of statements against penal interest: (1) unavailable witness; (2) truly inculpatory statement; and (3) reliability. It is only ***after*** a demonstration that the statement inculpates the declarant – a demonstration which this Court held makes the statement reliable, Williamson, 512 U.S. at 605 – that Virginia then ***additionally*** requires something "substantial other than the bare confession to connect the declarant with the crime." Morris, 229 Va. at 147, 326 S.E.2d at 694. This additional requirement is ***more*** than the federal rule of evidence or the Constitution requires.

wrong when he asserts that there is a "split" of authority that can have any relevance to the constitutional requirements for the admission of hearsay evidence in his case. Lilly's "no corroboration" argument demonstrates only his own misreading of the settled law governing the admission of hearsay; this Court should not grant certiorari merely to explain these already-decided principles.

VI. CERTIORARI SHOULD NOT BE GRANTED BECAUSE EVEN IF ERROR OCCURRED IT WAS HARMLESS.

Lilly's arguments present no compelling reason to grant certiorari because they were not properly preserved and involve only claims of misapplication of settled law to particular facts. However, even if an error had occurred, it would have been harmless in this case. See Lee, 476 U.S. at 547 (confrontation violation does not "foreclose the possibility that [the] error was harmless when assessed in the context of the entire case against [the defendant]"). Here, there is no credible argument that the other evidence in the case did not overwhelmingly prove that petitioner committed the capital murder. Gary Barker was an eyewitness who observed Lilly abduct, rob and murder Alex DeFilippis. (JA 2025-2173). Barker's trial testimony was far more detailed than Mark's pretrial statements, and it thoroughly corroborated Mark's statements. (JA 2254-2282, 2318-2332).

It was the petitioner's car that was used in the initial part of the crime spree and the petitioner's car that broke down, necessitating his abduction of DeFilippis and theft of his automobile. When he was apprehended wielding a shotgun, the petitioner lied to the police officers about his identity and that of his accomplices. Petitioner made incriminating statements: at the arrest site, petitioner called to his brother Mark in the woods to give himself up because Mark was "not the one who has done anything wrong;" in the police car, the petitioner asked Officer Whitsett to kill him and, when the officer asked what a murderer looked like, Lilly said "me." A forensic examination of the accomplices' clothing found blood on the petitioner's pants leg, yet no blood on

Mark's clothes and no blood on Gary's clothes that was not his own.

When assessed in the context of the entire case against the defendant, it is clear that Lilly's guilt was established by overwhelming evidence independent of the hearsay statements. The admission of the hearsay, even if erroneous, thus was harmless beyond a reasonable doubt.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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